IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 20785 and 21377

THE WESTERN PACIFIC RAILROAD COMPANY and the SOUTHERN PACIFIC COMPANY, suing on their own behalf and on behalf of all other railroads similarly situated,

Appellants

v.

HOWARD W. HABERMEYER, THOMAS M. HEALY, and A. E. LYON, individually and as members of the Railroad Retirement Board, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

APPELLEES' REPLY BRIEF

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WM. B. LUCK, CLERK

BAREFOOT SANDERS,
Assistant Attorney General

CARL EARDLEY
LESLIE A. NICHOLSON
Attorneys,
Department of Justice,
Washington, D. C. 20530.

Of Counsel

MYLES F. GIBBONS
General Counsel
U. S. Railroad Retirement Board

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STATEMENT OF THE CASE

The basic facts have been reported in the Appellants' Opening Brief, pages 2-8, and need not be repeated here. Any differences appellees may have will be referenced in the argument.

THE ISSUES

There are several threshold questions which must be resolved:

1. Is this action precluded by the Railroad Unemployment Insurance Act?
2. Do the appellants have standing to sue?
3. Has the United States consented to suit by the appellants?
4. Are all indispensable parties before the Court?

If each and all of the above issues are resolved in favor of appellants the issue will be whether the Board's procedures and determinations violated a statute or were arbitrary and capricious

SUMMARY OF APPELLEES' ARGUMENT

1. The statute in question specifically sets forth those matters which are to be the subject of court review, and provides that there will be no review as to all other matters. Denial of claims by the employee can be reviewed only at the instance of the employee. There is no provision allowing an employer to secure review of the allowance of an employee's claim. Indeed, the employer can only contest (a) the status of employment -- where the employer contends that the claimant is not an employee, and (b) the question as to whether contributions by or refunds to the employer are due. Significantly the Act provides that even where employment status is contested by the employer the claimant shall be paid insurance benefits, subject to possible later recovery by the Board.

2. The appellants are Federal taxpayers who contribute to a fund created for the protection of unemployed railroad workers. This fund is owned, controlled and managed by the Federal Government. The appellants have no standing to attack the manner in which the Federal Government manages its funds.

3. The United States has not consented to be sued in proceedings such as those before this Court. The actions taken by the officials under attack were within their statutory authority. The courts will not review discretionary decisions of executive agencies, particularly where these decisions relate to the expenditure of Government funds.

4. The appellants have made no effort to bring even one of the "C(6)" firemen receiving compensation before this Court. Since a judgment adverse to appellees would stop the payment of unemployment compensation to the "C(6)" recipients, these men are indispensable parties.

5. The Board's determinations were not arbitrary or capricious, but were in accord with the Act.

a. Neither the Arbitration Award nor the Act preclude C(6) firemen from receiving unemployment compensation by reason of their acceptance of severance pay. The severance pay was not intended as a substitute for unemployment compensation.

b. The Board was not under any statutory or other requirement to make individual findings with respect to each

fireman applicant. Under standard Board procedures when classes of persons are involved, a class decision is made, and payments follow this decision. In the present instance the decision that refusal of "comparable" employment and the acceptance of severance pay was neither a voluntary leaving of work, nor a refusal to accept suitable work without just cause had a rational basis, was within the statutory authority of the Board, and should not be reversed by the Court.

ARGUMENT

I

THE RAILROAD UNEMPLOYMENT INSURANCE ACT PRECLUDES SUIT BY AN EMPLOYER TO ENJOIN THE PAYMENT OF UNEMPLOYMENT BENEFITS TO ITS EMPLOYEES

The appellees treat this proposition first because in appellees' opinion it presents no genuine issue. Furthermore, if the Court should decide, as we believe it must, that the Act precludes any attack by the carriers upon unemployment insurance awards the Court need not reach any of the other points.

The pertinent provisions of the Act are set forth in Appendix B to Appellants' Opening Brief, and need not be repeated here in full. However, the following portions of the Act are relevant to the above proposition.

Section 5(c) of the Act provides that

> "Subject only to such review [the review provided for by subsection (f) of this section], the decision of the Board upon all issues determined in such decision shall be final and conclusive for

all purposes and shall conclusively establish all rights and obligations, arising under this chapter, of every party notified as hereinabove provided of his right to participate in the proceedings.

"Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f) of this section."

Section 5(f) provides for judicial review by an appropriate U. S. Court of Appeals only of decisions of the Board (1) denying claims in whole or in part, on the petition of the claimant or of the labor organization of which claimant is a member, and (2) granting claims where the Board has found claimant to be an employee of an employer which denies such relationship.

Subsection (g) of the Act provides that:

"findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of any other matter pursuant to Subsection (c) of this Section, and the determination of the Board that the unexpended funds in the account are available for the payment of claim for benefit or refund under this Act, shall be, except as provided in Subsection (f) of this Section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States and shall not be subject to review in any manner other than that set forth in Subsection (f) of this section."

In short, under the Act, Court review is limited to a denial of claims at the instance of the claimant, a denial of the status of employment at the instance of the employer and a denial of contributions due, or contention of refund due, at the instance

of the employer. Otherwise the findings of fact and conclusions of law of the Board are made final and conclusive. By this language Congress carved out and limited the areas as to which the employers were deemed to have a legitimate interest.

Here the Board's action in determining that C(6) firemen would not be disqualified under Sections 4(a-2)(i) and 4(a-2)(ii) from receiving benefits does not fall within the review provision of Section 5(f) of the Act; thus, this action of the Board is not subject to judicial review. For the Act, as shown above, provides that:

> "findings of fact and conclusions of law of the Board in the determination of any claim for benefits . . . shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons and . . . shall not be subject to review in any manner other than set forth in subsection (f) [of the Act]."

The Court of Appeals for the Seventh Circuit has held, quoting the above excerpt from subsection (g) of the Act, that:

> "A careful consideration of all of these sections of the Act convinces us that Congress intended to grant a judicial review of the decisions of the Board on claims for compensation where the employee status was not denied by the carrier, only to employees whose claims to compensation have been disallowed in whole or in part." (Emphasis added) Railway Express Agency v. Kennedy, 189 F. 2d 801, 804 (1951), cert. denied 342 U.S. 830 (1951).

The Railway Express Agency case, as this Court will note, involved a similar attack upon payments of claims by the Railroad

Retirement Board, and is, in fact, the only case directly in point. It is also worthy of note that in almost thirty years of administration there was only one attempt by an employer, other than the case at bar, to contest benefit payments, and that attempt ended in failure. We would suppose that if the District Court had jurisdiction of such actions, and if the Board was diverting and wasting funds as charged by appellants (Brief, pp. 35-36) there would have been more than two restraining actions filed in such a long period.

Appellants concede that subsection (f) does not provide a basis for this action (Brief, pp. 50-56); however, appellants seek to avoid the clear prohibition of subsection (g) and the holding by the Court of Appeals for the Seventh Circuit as follows: First, appellants argue that "subsection (g) precludes review only of those matters to which subsection (c) and (f) relate. . ." (Brief, p. 53). There is absolutely nothing in subsection (g) to support appellants' argument. Subsection (g) applies to <u>all</u> findings of fact and conclusions of law of the Board in the determination of any claim for benefits, which would include determinations granting as well as denying such claims. Congress obviously intended to include determinations granting claims since the finality provision applies specifically to the Comptroller General who would be primarily interested in claims which were granted.

Second, appellants argue that the instant case differs from the case before the Seventh Circuit Court of Appeals since here appellees have made a general finding applicable to the eligibility of C(6) firemen under Sections 4(a-2)(i), (ii) of the Act. (Brief, pp. 43, 55.) To the contrary, the case before the Court of Appeals for the Seventh Circuit involved a general finding also made initially by Mr. H. L. Carter, the Director of Employment and Claims (now called the Director of Unemployment and Sickness Insurance), that Railway Express Agency's New York employees were not disqualified for unemployment benefits under Section 4(a-2)(iii) of the Act. (Record, pp. 36-37.) The record in the _Kennedy_ case also reveals that the procedure followed by the Board in determining the eligibility of that group of claimants for benefits was the same procedure that is before this Court.

The legislative history of the Act confirms that Congress intended to prohibit the maintenance of this action. When the original bill was under consideration by Congress spokesmen for the railroads complained "there is no appeal provided anywhere in this bill for the railroads which pay the freight." (Hearings before the Subcommittee of the House Committee on Interstate and Foreign Commerce, 75th Cong., 3rd Sess. on H.R. 10127, p. 214, and Hearings before the Senate Committee on Interstate Commerce, 75th Cong., 3rd Sess. on S. 3722, p. 124.) Nevertheless, Congress did not change the provisions.

In 1945 a number of amendments to the Act and to the Railroad Retirement Act were being considered, including an amendment to

provide judicial review initially in the Circuit Court of Appeals, instead of in the District Courts as had been the case theretofore. And it appears from the colloquy between Congressman O'Hara and the Union representative, Mr. Schoene, that it was clearly understood that the employers would not have an appealable interest with respect to the question of whether or not an individual claimant was entitled to unemployment insurance. See Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 1362, 79th Cong., 1st Sess., p. 1091 (R. 108-109).

It should also be noted that the Act in addition to precluding the maintenance of this suit, prescribes a specific method of review where review is available. That limited review of Board actions must be in an appropriate Court of Appeals. Yet, appellants would circumvent this provision by seeking review in a Federal District Court. Where Congress has provided a particular method of judicial review that method must be followed. Cf. Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943); Whitney National Bank v. New Orleans Bank, 379 U.S. 411, 422 (1965). An action brought outside of the prescribed statutory procedure must be dismissed. See City of Tacoma v. Taxpayers, 357 U.S. 320, 336 (1957).

Appellees respectfully submit that this Court need and should look no further than subsections (c), (f) and (g) of Section 5 of the Act to affirm the District Court decision in this case.

APPELLANTS ARE WITHOUT STANDING TO SUE

Under the Railroad Unemployment Insurance Act, 45 U.S.C. 351, et seq., contributions to the fund are fixed by Congress on the basis of certain percentages set forth in Section 358. At the present time the employers are required to pay into the fund 4% of total compensation paid to all employees during the calendar year. This fund is deposited in the Treasury in an account known as the Railroad Unemployment Insurance Account. The moneys in the account are used exclusively for the payment of the benefits and refunds provided for in the Act (Section 360). Payment from the fund is controlled by the Railroad Retirement Board. There is no provision for any interest in, or control of, the fund on the part of the employers. The fund is not administered by the employers but entirely by the Federal Government. The fund is not the property of the appellants and they have no voice in its disposition.

The present rate of payment, as stated, is 4% and will remain at 4% until the insurance fund exceeds $300 million or until Congress changes the law. The fund is in the red by approximately $270 million (R. 84). Thus, before the appellants' rate can be reduced the fund must accumulate $590 million. Since at the present time the expected excess of income over outgo is about $17 million a year, it will be many many years before the appellants can suffer any conceivable injury (R. 86).

With these facts in mind it is the appellees' contention that the appellants have not shown any standing. The principle is set forth in Associated Industries v. Ickes, 134 F. 2d 694, 700, 701, cert. granted 319 U.S. 739, vacated as moot 320 U.S. 707 (1943) where the Court stated:

> "Unless, then, the citizen first shows that some substantive private legally protected interest possessed by him has been invaded or is threatened with invasion by the defendant officer thus regarded as a private person, the suit must fail for want of a justiciable controversy, it being then merely a request for a forbidden advisory opinion. That the plaintiff shows financial loss on his part resulting from unlawful official conduct is not alone sufficient, for such a loss, absent any such invasion of the plaintiff's private substantive legally protected interest, is damnum absque injuria."

This doctrine has not only been followed in the cases involving injury to the competitive position of certain plaintiffs such as in Alabama Power Co. v. Ickes, 302 U.S. 464 (1938) but in a variet of other cases where the Court has been unable to discover any private substantive legally protected interest which has been invaded by the Government. See e.g., Taft Hotel Corp. v. Housing and Home Finance Agency, 262 F. 2d 307 (C.A. 2, 1958), cert. denied 359 U.S. 967; Duba v. Schuetzle, 303 F. 2d 570, 574-575 (C.A. 8, 1962); Harrison-Halsted Com. Group v. Housing and Home Finance Agency, 310 F. 2d 99, 104 (C.A. 7, 1962), cert. denied 37 U.S. 914; Texas State AFL-CIO, et al. v. Kennedy, 330 F. 2d 217, 219 (C.A.D.C., 1964), cert. denied 379 U.S. 826; Pittsburgh Hotels Association, Inc. v. Urban Development Authority, 309 F. 2d 186

(C.A. 3, 1962), cert. denied 372 U.S. 916 (1963); Pennsylvania Railroad Co. v. Dillon, 335 F. 2d 292 (C.A.D.C., 1964), cert. denied 379 U.S. 945 (1964); Berry v. Housing and Home Finance Agency, 340 F. 2d 939 (C.A. 2, 1965).

In this particular case the contribution required of the employers is a tax (see Section 8H of the Act, 45 U.S.C. 358(h), H. Rept. No. 2668, 75th Cong., 3rd Sess., p. 8); Railway Express Agency v. Kennedy, supra. Consequently, the case is governed by the principles established in Frothingham v. Melon, 262 U.S. 447 (1923) which denied to a Federal taxpayer the right to enjoin expenditures of federal moneys. In the case of Railway Express Co. v. Kennedy, supra, the Court of Appeals said (p. 804):

> "It has been many times held that a taxpayer of federal taxes has no standing to sue to prevent the expenditure of federal funds under a statute which he claims to be unconstitutional, even though such expenditure might possibly result in an increase in the taxes which he will eventually be compelled to pay. Some substantial and more immediate harm must be shown to present a justiciable question concerning the state's power. The injury as it appears from this record, is neither so certain nor so substantial as to justify a finding, upon that showing, that appellants' substantial rights have been or will be invaded by allowance and a payment of the award. . . In the instant case also the injury of which the plaintiff is complaining is only a future possibility. . . ."

A similar result was reached by the Supreme Court in Gange Lumber Co. v. Rowley, 326 U.S. 295 (1945). In that case employers contributed to a state insurance fund for the benefit of injured workmen. A workman applied for compensation, and the employer

contended that the allowance of the claim was in violation of the authority of the administering agency. The United States Supreme Court pointed out that the State Supreme Court had noted that the funds were "in no sense the private property of the employer. Consequently, the payment of the award out of the fund in itself could not amount to a deprivation of the employer's property." With respect to the possibility of a rate increase the Court stated "It is entirely problematical whether an increase will follow, or, if so, whether it will be wholly mathematical and infinitesimal or substantial in its ultimate effect upon appellant This being so appellant's complaint comes down, on the record, to nothing more than the bare possibility of some injury in the future."

Although the sum involved in the instant action is considerably larger than that involved in the Gange or the Kennedy cases, the net result is the same. That is, it is entirely problematical whether any change in rates will follow, whether it will be infinitesimal or substantial; and accordingly there is no more than a bare possibility of some injury in the future. 1/

1/ To show a substantial interest (putting aside as moot the insurance benefits already paid) appellants rely upon a statement by the Management member of the Board that the wasting of the fund, so-called, in this matter could result in an increase in the rate. This is unsupported speculation. The amount now involved according to appellants of about $650,000 (R. 176) is of no real significance in the context of the unemployment insurance fund. The rates are prescribed as follows:

(continued on page 14)

The appellants contend that even though a federal taxpayer is involved the issue to be resolved is the proportionate interest of the plaintiff, and appellants appear to contend that if federal taxpayers can show a more substantial interest than that suggested in Frothingham v. Melon, then the Federal Court has jurisdiction. There is no authority for this position. The principles of the Frothingham case to the effect that federal taxpayers cannot attack the expenditure of federal funds in the control of the Government is still the rule in effect.[2/]

1/ (continuation)

Balance in Account as of September 30 (in millions)	Rate for calendar year
$450 or more	1.5%
$400 but less than $450	2.0%
$350 but less than $400	2.5%
$300 but less than $350	3.0%
Less than $300	4.0%

It will be noted that the rates change when the account fluctuates by increments of $50,000,000 or more. Thus, it is quite absurd to speculate that the payment of the remaining dwindling amount or indeed of the total amounts that may possibly have been paid throughout the period is likely to cause an increase in the rates. It is far more reasonable to surmise that if there is an increase in the rates it will have nothing to do with the amounts involved in this action. It is also self-evident that a decrease in the rates, considering the present deficit of ~~$280,000,000~~ $270,000,000 is remote indeed (an estimated 35 years)(R. 86).

2/ In support of their standing argument appellants appear to rely upon United States v. Butler, Stark v. Wickard, Coleman v. Miller, Reynolds v. Wade and Smith v. Virgin Islands. Only one of these cases (Butler) involved a federal tax. There the Court held that wheat processors had standing to attack the constitutionality of an Act, an incidental feature of which was the processing tax. In the instant case the right to tax is not at issue -- but the right to interfere with the disposition of tax moneys.

The decision of the Seventh Circuit Court of Appeals in Kennedy that an employer has no standing to challenge the Board's actions in approving claims for benefits is sound and should be followed by this Court.

III

THIS ACTION CONSTITUTES AN UNCONSENTED SUIT AGAINST THE GOVERNMENT

As stated in Dugan v. Rank, 372 U.S. 609, 620 (1963):

> "the general rule is that suit is against the sovereign if 'the judgment sought would expend itself on the public Treasury or domain, or interfere with the public administration,' Land v. Dollar, 330 U.S. 731, 738 (1947), or the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act,' Larson v. Domestic & Foreign Corp., 337 U.S. 704 (1949); Ex parte New York, 256 U.S. 490, 502 (1921)."

It is evident that an action to enjoin officials of the Railroad Retirement Board from paying unemployment insurance provided by the Act operates directly against the United States since it would interfere with the statutory program set up for the benefit of unemployed railroad employees, and would thus constitute "interference with the public administration," Land v. Dollar, 330 U.S. 731, 738 (1947). Also see Malone v. Bowdoin, 369 U.S. 643 (1962); Panama Canal Co. v. Grace Line, 356 U.S. 309 (1958).

The United States has not consented to this suit.[3/] Appellant

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3/ 28 U.S.C. 1331 does not authorize suits against the United States. Henderson v. United States, 229 F. 2d 673, 677 (C.A. 5, 1956); cf. Blackmar v. Guerre, 342 U.S. 512, 515-516 (1952). Nor is there any authority to support the proposition that 28 U.S.C. 1337 authorizes injunction or mandamus actions against the United States.

seek to bring this action within the scope of the rule that a suit to enjoin federal officers who have exceeded their statuto authority is not a suit against the United States. See Dugan v. Rank, 372 U.S. 609, 620 (1963). In this regard, appellants con that the Board violated that portion of the statute that author and directs the Board "to make findings of fact with respect to any claim for benefits. . ." 45 U.S.C. 355(b). (Brief, p. 56.)

The Board has found that C(6) firemen who accepted severan pay rather than a comparable job under the Arbitration Award should not be considered to have voluntarily left work within the meaning of the Railway Unemployment Insurance Act. The Board has further found that C(6) firemen who rejected comparab work and accepted severance pay under the Arbitration Award should not be considered to have rejected suitable work without good cause within the meaning of this statute. Appellees argue that the Board is required by statute to make individual findin on these issues in regard to each C(6) fireman instead of makin findings, as above, which are applicable to all such C(6) firem

Contrary to appellees' arguments, the statute contains no requirement that the Board make "individual" findings. The abo findings by the Board were made "with respect to any claim for benefits. . ." made by C(6) firemen. The statute requires noth more. Common sense alone refutes appellants' argument. By mak uniform findings on facts common to certain groups of claimants the Board is able to process applications both more rapidly and

more equitably. Furthermore, Section 5(b) authorizes the Board to establish such procedures as it may deem necessary or proper for the determination of a right to benefits.

Any doubt as to the validity of the Board's procedure in making uniform findings on the above two issues is refuted by the affidavit of Mr. Harold Bishop (R. 220). As that affidavit shows the Board has, in the past, regularly made similar uniform findings in regard to other groups of applicants. (R. 221, 222.) Where an administrative practice, such as this, has been consistently followed and has not been disapproved by Congress in the course of several amendments to the applicable statute, the practice is presumed valid absent overwhelming evidence to the contrary. See, e.g., Boesche v. Udall, 373 U.S. 472, 483 (1963); Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 313 (1933) Whattoff v. United States, 355 F. 2d 473, 478 (C.A. 8, 1966); Hood v. United States, 256 F. 2d 522, 527 (C.A. 9, 1958).

It is clear that, as stated by the District Court, "in this matter the Board has acted well within the limits of the discreti vested in it by law." (R. 143.) Cf. Brotherhood of Railway and Steamship Clerks, etc. v. Railroad Retirement Board, 239 F. 2d 37 (D.C. Cir., 1956) (Board's finding affecting all claimants upheld no question raised of necessity for individual findings).

Since appellants answer to the issue of unconsented suit is the alleged failure of the Board to make individual findings, and

since there is no such requirement the decision of the District Court should be affirmed.[4/]

IV

THE APPELLANTS HAVE FAILED TO JOIN INDISPENSABLE PARTIES

If the appellants were to succeed in this action and an injunction were to issue prohibiting further payments, pending further action of the Board, the C(6) firemen receiving compensation would be adversely affected immediately, if not permanent since their unemployment insurance payments would stop forthwith Under these circumstances, it appears that these recipients are indispensable parties, since a judgment in this case would adversely affect their direct interest. See Montfort v. Korte, 100 F. 2d 615, 617 (C.A. 7, 1938); Metropolis Theater Co. v. Barkhausen, 170 F. 2d 481, 485 (1948), cert. denied 336 U.S. 945

Of course, the Board in this action is contesting the reque for an injunction, but for different reasons than might be advanced by legal representatives of the affected C(6) firemen. The Board has no financial interest in the outcome of the litigation whereas the employees have a direct financial interest which they would be in a better position to assert than the Boar

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4/ As we shall point out in a subsequent section of this brief even were the Court to rule that individual findings were requir such a requirement was met. (See Section V(B) of this brief).

On this point see Litchfield v. Register and Receiver, 9 Wall. (U.S.) 575 (1869); Denver & Rio Grande Railroad Co. v. United States, 124 Fed. 156 (C.A. 8, 1903).

The District Court found that the injunctive relief sought by appellants "would adversely affect . . . the interests of the so-called C(6) firemen who are neither parties to nor represented in this action." (R. 251). This action should not proceed without some representation of these men.

V

THE BOARD'S DETERMINATIONS AND PROCEDURES WERE NOT ARBITRARY OR CAPRICIOUS, BUT WERE IN ACCORD WITH THE ACT

A. The Decision of the Board that a Claimant of Insurance Benefits did not Leave Work "Voluntarily" and did not Refuse to Accept Suitable Work Available and Offered to Him "Without Good Cause" by Electing to Reject Other Employment and to Accept the Severance Pay in Accordance with the Provisions of the Arbitration Award, Should not Be Disturbed by this Court.

As is commonly known, the railroads and certain labor unions were engaged in a long dispute concerning the continuing need for firemen, in view of the development of the diesel engine. Althoug many years were devoted to negotiations in the hope that the dispute could be resolved amicably the parties were unsuccessful in reaching an accord. After all of the procedures of the Railway Labor Act had been completed and the parties were left to self-hel the labor unions called a strike. In view of the national emergen

Congress passed an act in 1963 appointing an Arbitration Board composed of representatives of the unions, of the carriers and of the public, to make an arbitration award which would resolve the conflict. That Board did formulate an award, and the paragraph concerned herein is paragraph C(6) which provides in substance that all firemen with more than two and less than ten years seniority shall retain their rights to engine service assignments unless and until offered another comparable job such as engineer, fireman, brakeman or clerk, which offer shall carry with it guaranteed annual earnings for a period not exceed- ing five years equal to the compensation received by the employe in the preceding twelve months. The fireman must either accept the offer of a comparable job or forfeit his employment and seniority rights and take the severance allowance provided for in paragraph C(3). (The full text of paragraph C(6) can be foun in Appendix A of Appellants' Opening Brief.) A large number of firemen, upon being faced with the alternative of taking another type job or taking severance pay, elected to accept severance pa thereby terminating their employment with the railroad. Many of these persons were unable to secure other work and subsequently applied for unemployment insurance under the Act. The question on the merits is first whether the Board's determination that th firemen were and are entitled to receive such payments is an arbitrary or capricious decision and second whether any mandator provision of the Act was violated by the form of this decision.

The Act, 45 U.S.C. 354(a-2), provides that a claimant of insurance benefits is not to be considered unemployed if the Board finds that he "left work voluntarily without good cause," or "failed without good cause to accept suitable work available and offered to him." The Board ruled that a fireman who elects to take severance pay rather than a comparable job has not left his work voluntarily under the Arbitration Award. The Board also ruled that the election to take severance pay rather than another job was not a refusal of suitable work "without just cause". In short, the Board ruled that the award gave the firemen, upon having their jobs as firemen abolished, a free election which would not result in denial of the benefits of the Unemployment Insurance Act. These rulings seem fair and reasonable. It is clear that the purpose of the Arbitration Award was to give C(6) firemen a perfectly free choice. If by choosing to reject the offered job and take severance pay the C(6) firemen would forfeit their future rights to unemployment benefits, then their choice would not in fact be free. Thus, it was clearly reasonable for the Board to find that the effectuation of the Arbitration Award necessitated a finding that no C(6) fireman who accepted severance pay should be considered to have left his job voluntaril or to have rejected suitable work without good cause. As Mr. Garland in his affidavit pointed out:

> "It was concluded that a C(6) fireman exercising the right of choice given him by the Award should not be regarded as doing something

reprehensible from the social insurance standpoint which would disqualify him for benefits. Consequently, following informal consultation with the Bureau of Law, Mr. Carter in his memorandum advised the Regional Directors and the Chief of Claims Operations that such a fireman was not to be regarded as having failed to accept suitable work within the meaning of Section 354(a-2)(ii). Since the fireman was regarded as having 'good cause' for what he did, there was, of course, no necessity for investigating the suitability of the work offered him. . . . The fact that a C(6) fireman who chose to take a separation allowance was not to be regarded as subject to the disqualification provisions mentioned above did not mean that every such employee was to be regarded as entitled to unemployment benefits. All the basic qualification and eligibility requirements of the Act would, of course, have to be met. The availability requirement in particular would be very carefully considered in the case of such an employee and benefits would not be paid him if under all the circumstances he could not be regarded as ready and willing to work and as making such efforts to secure employment as would be reasonable under the circumstances." (R. 92.)

Appellants contend that the severance pay was intended to tide the men over while they looked for other work, and that they should not be able to pocket both severance pay and unemployment benefits. However, the Act explicitly provides money to unemploye[d] workers to tide them over periods of unemployment. Accordingly, there was no necessity for the Arbitration Board to provide funds for the same purpose. The real purpose of the severance pay was expressed in the following testimony which took place before the Senate Committee on Commerce on the Hearing on Administration of Public Law 88-108, August 30, 1965.

"Mr. Habermeyer. Well, the only way we got involved in that at all was this: Under the provisions of the Arbitration Award, certain of these firemen, after being told that they were being removed from their job as firemen, had a choice to make. They could take a lump sum amount of money --

Senator Magnuson. Did you apprise them of their severance pay?

Mr. Habermeyer. No, we didn't but they knew about that, and they had a choice to make of either taking a lump sum and removing themselves from the carrier entirely, or taking a job that the carrier offered them. Now, we do have a restriction of payment of unemployment benefits if a man voluntarily quits his job.

Senator Lausche. May I put this question?

Senator Magnuson. Yes, go right ahead.

Senator Lausche. In the event the worker agreed to accept a severance pay reimbursement, would that disqualify him from the right to obtain unemployment compensation?

Mr. Habermeyer. No, sir. It did not.

Senator Lausche. It did not?

Mr. Habermeyer. It did not.

Senator Lausche. That is, if he voluntarily says, 'I'll quit my job if you give me a severance pay'?

Mr. Habermeyer. I wouldn't say he was voluntarily quitting his job as a fireman. The carrier told him he was being separated from his job as a fireman. They offered him an alternative then of taking a sum of money or another job. And we held that the offer of the other job was not a voluntary action on this man's part in separating himself from the industry and he took the lump sum payment.

Senator Lausche. That would mean a worker who took a severance pay under your decision was not construed to have quit on his own?

Mr. Habermeyer. That's right.

Senator Lausche. And since he did not quit on his own, he was entitled to unemployment compensation?

Mr. Habermeyer. Yes sir.

Senator Magnuson. I think that was the right ruling.

Mr. Habermeyer. That's the only way we got involved.

Senator Magnuson. Severance pay was not involved in his unemployment. It was merely a so-called bonus?

Mr. Habermeyer. An alternative that they offered him."

As we understand appellants' argument they do not challeng the Board's right to make blanket rulings which cover all perso falling in a specific class, but they deny that all the C(6) fi men applying for insurance benefits could have been properly placed in one class. For example, they allege that some fireme quit their jobs and took severance pay before being required to make an election -- that is they voluntarily quit before being confronted with the prescribed option. Then, some firemen, so appellants allege, must have been offered other employment whic they rejected, electing to take the severance pay. Then, if th same firemen subsequently took the proffered jobs, their own actions established that they were "suitable". Appellants argu that if they were "suitable" at a later date they must have bee "suitable" at the earlier date.

The answer is that the Board ruling (whether this was, in fact, a proper Board ruling, is covered in the next section of this brief) covered all firemen who, under the Arbitration Award, were faced with the option of taking another job or of taking severance pay, and as to them ruled that if they elected to take the severance allowance they would not be deprived of the benefits of the Act. Thus, if a fireman were given a severance allowance before his job was eliminated, he would not be covered by the ruling. But where, as here, if a fireman's job were abolished and he was offered another job his refusal of the offered job in the first instance would be with just cause. The just cause was the determination of the Board that the refusal of a comparable job and the acceptance of the severance pay should not penalize him insofar as the insurance benefits were concerned. But once he had received the benefit of this ruling he could not continue thereafter to reject suitable employment on the basis of the Award He would be treated exactly the same as other employees who were not involved in the Award. (R. 135d.)

We submit, therefore, that the ruling did apply to a general class, and that it was as sensible a ruling as could have been made. However, let us accept arguendo appellants' contention that the severance pay was in lieu of unemployment insurance, and follo through on such a decision. Initially, it would require the Board to determine how much each employee received, and how long the severance pay award would be considered to prohibit the employee

from claiming unemployment insurance payments. Such a ruling, apart from the massive statistical work involved would not present the C(6) fireman with a free option. By taking the severance pay the fireman would forfeit unemployment insurance of an equal amount. Or take the situation where the employee takes the severance pay and then gets another job, would the employee be required to pay back the severance pay? Or if this employee then loses his new job, would he then have no right to unemployment benefits until the severance pay was used up -- even though he spent the severance pay months before for a new car? Examples of this nature could be endlessly multiplied. They would only show the impossibility of the Board reaching any practical and equitable decision, other than the decision which is challenged herein by appellants.[5/]

Appellants also attempt to make some capital out of the Board's directive that an employee's resignation to take severance allowance is voluntary if "provisions of the agreement or plan under which the severance allowance is paid are such that the employee could have continued working for his employer in his same occupation and at the same location, with prospects for future employment not substantially diminished." (Brief, p. 27.) Of course, this provision has no relationship to the Arbitration Aw

5/ For a more detailed discussion of this and other directives see the Bishop affidavit. (R. 220, 225-226.)

That Award was based on exactly the contrary assumption -- that the fireman jobs would be abolished, and that accordingly the fireman obviously could not continue to work at the "same occupation" at "the same location". Appellants by innuendo suggest that unemployment benefits were paid to firemen who refused to keep on working as firemen at the same location, but there is nothing in the record to support such an assumption.

Appellants further urge that although the Act refers to persons who have "left work voluntarily", the Board has construed the word "work" to mean "job". Appellants are correct. Under the Board's ruling the fireman who accepts severance pay in lieu of another "comparable" job does not lose unemployment insurance benefits. This ruling is quite reasonable. The statute doesn't purport to impress employees into an industry. It provides for unemployment insurance when they are unable to find suitable work. Two steps are contemplated. The first is that the man lose his job, and the second is that he doesn't refuse other suitable work without just cause. Although the statute uses the word "work" it is evident from the general context and the steps involved that Congress was contemplating jobs, not a general employment relationship. (On this point see the explanation of the General Counsel of the Board. R. 135.)

In all events the Act lodges the Board with the authority to determine whether a person had voluntarily left work or refused suitable work without good cause and unless its rulings are

arbitrary and capricious and without any rational basis the Court should not interfere therewith. See Boske v. Commingore, 177 U.S. 459, 470 (1900); Brotherhood of Railway and Steamship Clerks etc. v. Railroad Retirement Board, 239 F. 2d 37, 44 (D.C. Cir., 1956). In Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949) it was pointed out that the authority to make a decision is the authority to make the wrong decision. (Page 695.)[6/]

In the Panama Canal Co. v. Grace Line, 356 U.S. 309 (1957) shipping companies sued to compel the Canal Company, an agency of the United States, to revise its rates, contending that the formula

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6/ In the case of Leedom v. Kyne, 358 U.S. 184 (1958) relied upon by appellants an order was issued by the NLRB which was in flagrant violation of the specific terms of a statute. The question was the jurisdiction of the District Court to review the order. The Supreme Court held that the court had the power to strike down an order in excess of its statutory powers, and contrary to the specific prohibition of the Act.

In subsequent decisions the Court has been careful to restrict this ruling to such instances. See Railway Clerks v. Employees Association, 380 U.S. 650 (1964), and Boire v. Greyhound Corporatio 376 U.S. 473 (1963). In the latter case the Court said that the review authority of the lower court is limited to the question of statutory authority and does not permit "plenary district court review of Board orders . . . whenever it can be said that an erroneous assessment of facts before the Board has led it to a conclusion which does not comport with the law. Judicial review in such a situation has been limited by Congress to the courts of appeals and then only under the conditions explicitly laid down in . . . the Act."

In the instant case there is no question raised as to the authority of the Board to make the challenged payments. The appellants merely contend that the Board's ruling is an unjustified interpretation of the Arbitration Award and of the Unemploymen Insurance Act. These circumstances don't bring the case within the narrow orbit of the Leedom case.

in use was contrary to the Act. The Court ruled against the shipping companies and stated:

> "Where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. . . . The matter should be far less cloudy, much more clear for courts to intrude."

In <u>Udall</u> v. <u>Tallman</u>, 380 U.S. 1 (1965) the Supreme Court stated p. 16:

> "When faced with the problem of statutory construction this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. To sustain the Commission's application of the statutory term we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings (citations)."

In concluding the Court said p. 18 "If, therefore, the Secretary's interpretation is not unreasonable, if the language of the orders bears his construction, we must reverse the decision of the Court of Appeals." Also see <u>Wilbur</u> v. <u>United States</u>, 281 U.S. 206 (1929 <u>Adams</u> v. <u>Nagle</u>, 303 U.S. 532 (1938); <u>Christine Mitchell</u> v. <u>McNamar</u> 352 F. 2d 700 (C.A.D.C., 1965); <u>Riverside Oil Co.</u> v. <u>Hitchcock</u>, 190 U.S. 316 (1902).

The Board's conclusions in the absence of compelling evidence of abuse of statutory or discretionary power should not be overrul There is no such evidence in this case.

B. The Board's Procedures Were Not in Violation of its Statutory Duties

The appellants complain of the procedures:

1. The Carter memorandum was not the official action of the Board.

2. The Carter memorandum failed to follow the Act.

3. The Board failed to make individual findings.

These contentions lack any substantial merit.

THE CARTER MEMORANDUM

Section 5(b) of the Act states:

> "The Board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits. The Board is further authorized . . . to establish, by regulations or otherwise, such procedures as it may deem necessary or proper for the determination of a right to benefits."

And under Section 12(m) (45 U.S.C. 362m) the Board is "authorized to delegate to any member, officer or employee of the Board any of the powers conferred upon the Board by this Act, excluding only the power to prescribe rules and regulations." Pursuant to these provisions the Board made the following delegation to the Director of Unemployment and Sickness Insurance which is found at 20 C.F.R. Section 320.5. ". . . Claims shall be adjudicated, and initial determination shall be made, in accordance with instructions issued by the Director of Unemployment and Sickness Insurance. . ." Accordingly, the action of the Director of Unemployment and Sickness

Insurance Mr. Carter, in issuing the June 5, 1964 memorandum, was fully authorized by the statute and regulations.[7]

Appellants further contend that the Carter memo improperly stated the ruling which was followed. It declared, in part, "A fireman confronted with this choice who chooses separation from service is not to be regarded as having failed to accept suitable work within the meaning of Section 4(a-2)(ii) of the Act." From this statement appellants argue that the Board had ruled categorically that all jobs of whatever description which were offered to firemen whose jobs were being eliminated were unsuitable. (Brief, p. 29.) They say that Government counsel attempted to overcome this absurd ruling by arguing that the Board had only declared that the refusal of comparable employment would not be without *good cause*, and that suitability, therefore, was irrelevant. Appellants' argument is legal nit-picking at its worst. Mr. Carter did not say that all comparable jobs offered to displaced firemen were unsuitable. He said that the rejection of the job would not be regarded as a refusal of "suitable work within the meaning of the section 4(a-2)(ii) of the Act." And that section provides that suitable employment can be rejected for *good cause*. Furthermore, on September 24, 1964, long before this action was commenced, the General Counsel of the Board explained the ruling to Gregory Prince, Executive Vice President and General Counsel of the Association of American Railroads. (R. 135a, c.)

7/ A resume of the history of the Carter memo, and of comparable situations is set forth in the Bishop affidavit. (R. 220-226.)

The Lack of Individual Findings

The appellants contend that the Act requires individual findings, and that none was made in connection with the payment of displaced firemen. It is true that the Board did not issue specific findings with respect to each individual fireman -- but applied the ruling set forth in the authorized Carter letter.

The processing of insurance benefit claims is described in the Garland affidavit. (R. 87-93.) In brief, claimants fill out a form (R. 94) which is filed in a District Office. There it is examined to determine whether the claimant meets the eligibility requirements and is not subject to the several disqualification provisions. If the claim is approved it is forwarded to the appropriate division for payment. If it is denied, the applicant can take advantage of the administrative appeals procedures. (R. 89-90.)

As shown by the Railroad Retirement Board (1965 annual report at pages 37 and 42) there were in the year 1964-1965, 111,000 railroad workers who claimed and were paid unemployment insurance benefits and in 1957-1958, 312,000 workers were receiving insurance benefits. Of course, it would be physically impossible for a Board to consider and make findings with respect to each one of these claims, particularly since each beneficiary registers and claims benefits every fourteen days. (45 U.S.C. 351(h).)

Ordinarily the District Office accepts the certifications set forth in the claim form, but in the event it receives other information raising a doubt as to the claimant's rights an investigation is made. (R. 90.) When information is received which

suggests problems are about to arise concerning groups of employee an investigation is promptly made, and rulings issued, so that delays in the processing of applications will be avoided. Such an instance was the Arbitration Award (R. 91, 221-226) and the Bishop affidavit, after a careful recitation of the applicable rules states:

> "The claims of O(6) firemen have been handled in strict accordance with the terms of the statute and with the regulations and practices of the Board. Both procedurally and substantively, the application of the disqualification provisions has been entirely consistent with the application of those provisions prior to the Carter memorandum of June 5, 1964." (R. 226.)

With regard to the specifics of appellants' contention -- the statute relied on reads as follows: "The board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits." (Section 5(b), 45 U.S.C. 355(b).) Other sections provide for the finality of findings of fact (45 U.S.C. 355(f)(g).) Appellants read the statute as requiring the Board to issue findings for each claim. The statute makes no such requirement. Actually, under 45 U.S.C. 362(i), the Board may accept the claimant's registration as initial proof of unemployment, sufficient to certify payment. Furthermore, Section 5(b) of the Act (45 U.S.C. 355(b)) authorizes the Board to establish such procedur as it may deem necessary or proper for its determination of a righ

to benefits. The Board's action in regard to the C(6) firemen is not only authorized by Section 5(b), but also makes possible the acceptance of registration by C(6) firemen as a basis for payment of benefits.

Findings of fact are required in statutes of this description so that a review body will have a competent record before it. In this case the Carter letter was a finding of fact and conclusion of law with respect to all C(6) firemen; and as this case establishes it has furnished the appellants and the Court with sufficient information of the Board ruling to make a dispositive ruling. Furthermore, even if the statute did require individual findings the claim filed by the applicant, with its certifications when accepted and acted upon by the Board certainly constitute findings. We submit that this aspect of the appellants' argument is without any merit whatsoever. The reasonableness of making one general finding in situations involving facts common to many claims has been judicially approved. See Brotherhood of Railway and Steamship Clerks v. Railroad Retirement Board, 239 F. 2d 37 (C.A. D.C., 1956) and Railway Express Agency v. Kennedy, supra. 8/

8/ Contrary to the suggestion in the footnote on page 55 of the Appellants' Opening Brief as to the findings being considered in the Kennedy case, the record of the Kennedy case shows that the action of the Director of Unemployment and Sickness Insurance was precisely the same there as in the instant case. At pages 36-37 of the transcript of record in the Kennedy case there appears the following extract from the November 1, 1950 affidavit of Horace L. Carter, Director of Employment and Claims, Railroad Retirement Board:

(continued on page 35)

CONCLUSION

Appellants are firmly convinced that the rulings and procedures of the Board were entirely correct. However, this Court

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8/ (continuation)

"4. Since claims for benefits under the Act are made for short periods, and each claim involves a relatively small amount, the adjudication procedure has been made as simple as possible to permit expeditious handling of large volumes of claims. As indicated in Section 320.5, it consists principally of examining the application and claim forms and entering thereon a determination regarding the compensability of the days claimed as days of unemployment or sickness. When the circumstances so require, further evidence is secured by correspondence or field investigation.

"5. Under instructions issued by the Bureau of Employment and Claims pursuant to the provisions of Section 320.5, a regional office which has for adjudication claims, such as those in the instant case, involving the strike provisions of Section 4(a-2)(iii) of the Act, is required to make a thorough investigation of all relevant phases of the case and to submit the information thus obtained to the Bureau of Employment and Claims for review. The Bureau reviews the matter and advises the regional office whether or not the disqualification provision is applicable. The regional office then adjudicates the claims. If the claims are denied, the administrative review provisions contained in Part 320 of the Regulations are applicable.

"6. The procedure described above was followed in the instant case. The Board's New York regional office made a thorough investigation of the strike, securing detailed information both from the Railway Express Agency, Incorporated, and from the employees' Labor organization. Upon reviewing the information thus secured, I advised the regional office by teletype on October 9, 1950, that Section 4(a-2)(iii) was not applicable. The regional office then proceeded with the adjudication of the claims."

should not reach the merits since it is quite clear that the appellants have no right to challenge the Board's payment of insurance benefits to C(6) firemen since the Act explicitly limits judicial review at the instance of an employer to certain matters, not including the payment of claims to recognized employees. For these, and the other jurisdictional bars discussed herein we respectfully submit that the judgment of the District Court should be affirmed.

BAREFOOT SANDERS,
Assistant Attorney General

CARL EARDLEY
LESLIE A. NICHOLSON
Attorneys,
Department of Justice,
Washington, D. C. 20530.

Attorneys for Appellees

Of Counsel

MYLES F. GIBBONS
General Counsel
U. S. Railroad Retirement Board

January 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CARL EARDLEY
Attorney, Department of Justice,
Washington, D. C., 20530.